No. 14929

United States Court of Appeals

For the Ninth Circuit

HAROLD G. BAUER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

GERALD D. HILE and
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United States Court of Appeals
For the Ninth Circuit

United States of America,	*Appellee.*	No. 14929
vs.		
Harold G. Bauer,	*Appellant,*	

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

BRIEF OF APPELLANT

JURISDICTION

The Grand Jury for the Western District of Washington, Northern Division, returned an indictment consisting of One Count, charging the appellant, Harold G. Bauer, with possession of gold bullion in violation of Title 12, U.S.C., Section 95(a), and Executive Order 6260, as amended (R. 3). On March 28, 1955, the appellant was arraigned and pleaded not guilty (R. 5-6). On July 26, 1955, the appellant was tried to a jury and on July 28, 1955, a verdict of guilty as charged in the indictment was returned by the jury. On September 19, 1955, the appellant was adjudged to be guilty, as charged in Count 1 of the indictment, and was convicted. It was further adjudged and ordered that the appellant be confined in the King County jail at Seattle, Washington, or another institution for a period of ninety (90) days.

The judgement, sentence and commitment were entered on September 20, 1955. On September 20, 1955, the

appellant gave timely notice of appeal (R. 13, 14) in accordance with Rule 37 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.) and perfected the same in accordance with Rule 39 of the Federal Rules of Criminal Procedure and the Rules of the Court of Appeals, Ninth Circuit.

STATEMENT OF THE CASE

The appellant, Harold G. Bauer, was indicted on March 23, 1955, by Grand Jury for the Western District of Washington, Northern Division, which returned the following indictment:

"COUNT I

"The Grand Jury charges:

"That on or about the 12th day of February, 1954, at Seattle, within the Northern Division of the Western Division of the Western District of Washington, the defendant, Harold G. Bauer, then and there not being a person permitted to hold in his possession or retain a legal and equitable interest in gold bullion by any regulation issued by the Secretary of the Treasury and approved by the President of the United States, did then and there wilfully, unlawfully and knowingly hold in his possession and retain a legal and equitable interest in gold bullion in excess of the value of One Hundred Dollars ($100.00) and in excess of Thirty-Five (35) fine Troy ounces, to-wit, approximately Fifteen (15) crucible-shaped gold ingots of a total gross weight of approximately Three Hundred Thirty-Eight and 90/100 (338.90) ounces, situated in the United States, and owned by a person subject to the jurisdiction of the United States, without a duly issued license authorizing and permit-

ting him to so hold in his possession and retain a legal and equitable interest in said gold bullion.

"All in violation of Title 12, U.S.C., Section 95 (a), and Executive Order 6260, as amended.

"A True Bill." (R. 3, 4)

The appellant pleaded not guilty and was granted leave to move against the indictment (R. 5, 6). On May 16, 1955, the appellant, by his counsel moved that the case be dismissed for the reason that the indictment failed to allege facts sufficient to constitute a crime by the appellant against the laws of the United States of America. Appellant's motion was denied (R. 7). Defendant was tried to a jury and found guilty (R. 8). Prior to judgment and sentence, the appellant moved in arrest of judgment on the ground that the indictment did not state sufficient to constitute an offense against the United States. This motion was denied (R. 10, 11). From a judgment and sentence entered by the Honorable William J. Lindberg, United States District Court, Western District of Washington, Northern Division, the appellant has appealed.

SPECIFICATION OF ERRORS

1. The trial court erred in refusing to dismiss the indictment on the appellant's motion to dismiss. (R. 7)

2. The trial court erred in denying appellant's motion in arrest of judgment. (R. 10)

3. The trial court erred in entering judgment on the verdict, adjudging the defendant guilty of the offense of violation of Title 12, U.S.C., Section 95(a), Executive Order 6260, as amended, as charged in Count 1 of the indictment.

ARGUMENT FOR APPELLANT

I.

Executive Order 6260 Was Not in Force on February 12, 1954, the Date of Appellant's Alleged Offense.

The appellant, Harold G. Bauer, was indicted and charged with possession of gold bullion. The Government alleged that such possession constituted a violation of Title U.S.C.A. Sec. 95(a) and Executive Order 6260, as amended, promulgated thereunder. Title 12 U.S.C.A. 95(a), as it existed on February 12, 1954, the date of the alleged offense, and so far as here relevant reads as follows:

> "During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> "(A) investigate, regulate, or prohibit * * * the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities * * *
>
> "by any person, or with respect to any property, subject to the jurisdiction of the United States; * * *
>
> "(3) * * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; * * *

Executive Order 6260 promulgated on August 28, 1933, declared a period of National emergency and provided in Section 5, as follows:

"After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order provided; however, that licenses shall not be required in order to hold in possession or retain an interest in gold coin, gold bullion, or gold certificates with respect to which a return need not be filed under section 3 hereof."

The executive order further provided (Section 9) that the Secretary of the Treasury was authorized to issue regulations for the purpose of carrying out the order.

The appellant is charged with having wilfully violated the provisions of Executive Order 6260, thus subjecting himself to criminal liability under 12 U.S.C.A. 95(a). It is the contention of the appellant that Executive Order 6260 was of no force or effect on February 12, 1954, the date of the alleged offense, and in fact had long since ceased to be of any legal effect.

A. Background Analysis of the Executive Order and Statutes Involved.

Before discussing the present status of Executive Order 6260, it is necessary to examine the background of this order and 12 U.S.C.A., Section 95(a), the statute on which it is based. On October 6, 1917, Congress, concerned with meeting the exigencies of the First World War, enacted The Trading with the Enemy Act of 1917 (40 Stat. 411). The act delegated various powers to the President, dealing with the war time emergency, and Section 5(b) of the act read as follows:

> "That the President may investigate, regulate, or prohibit under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transaction in foreign exchange, export, or earmarking of gold or silver coin, or bullion, or currency, * * * by any person in the United States;"

After World War I, The Trading with the Enemy Act was not repealed but lay dormant. In 1929 the United States entered the era which has since come to be known simply as "The Depression." On March 4, 1933, when Franklin D. Roosevelt was inaugurated as President the nation faced an extreme banking and monetary crisis. The banks in every state were either closed or operating under severe restrictions. The immediate cause of the closing of the banks was the run upon the Federal Reserve banks for gold. Under the laws and established practices then existing, all forms of money had been redeemable in gold merely by presentation to the Federal Reserve bank or to the Treasury. In practice, the exchange was made without any question. When the financial crisis deepened, the people began to exchange their currency for gold, and to hoard the gold. The Federal Reserve banks continued to pay out gold and the supply was rapidly sinking. In the ten days before March 4, close to $1,550,000,000.00 was withdrawn from the Federal Reserve system. The net loss of gold through earmarkings and other operations approximated 169.4 millions of dollars in February and 113.3 millions in March before the outflow was stopped. (See the following reference material: The Future Comes by Charles A. Beard and George H. E. Smith, New York 1933; The first chapter of The New Deal

by John A. Lapp, Chicago, 1933. For a description of the conditions constituting the national emergency of 1933, see the oral argument of the Attorney General in *Norman v. B. & O. R. Co.,* 294 U.S. 240, beginning at page 253.)

On March 6, 1933, the President issued Proclamation 2039 (Codified 31 CFR, Sec. 120.1) declaring a national bank holiday for all banking institutions in the United States, from March 6, 1933 to March 9, 1933. This bank holiday was later extended indefinitely by Proclamation 2040. (Codified 31 CFR, 120.2)

The foregoing proclamations, in addition to declaring a bank holiday, also prohibited the export, import, and earmarking of gold bullion, and also prohibited banks from paying out any gold bullion. The President recited as his authority for these proclamations the old Trading with the Enemy Act of 1917. Since The Trading with the Enemy Act was solely a wartime act, there was in actuality no authority for these proclamations. It was simply a question of expediency. As President Roosevelt himself said, referring to his bank holiday proclamation,

> "In that proclamation there were four or five main objectives. The first one was to prevent the withdrawal of any further gold and currency. The old War Statute of 1917 had not been repealed and we used it. It was an exceedingly useful instrument . . ." (From Address of President Roosevelt before the Governor's Conference at the White House, delivered March 6, 1933.)

However, President Roosevelt had ready for submission to Congress a bill which amended The Trading

with the Enemy Act so as to make it available for use during emergencies declared by the President in addition to war time emergencies.

It is obvious even from the title of the bill, which became the Act of March 9, 1933, that it was passed purely because of the then most serious economic depression. The title to the Act of March 9, 1933, reads as follows:

"AN ACT

To Provide relief in the existing national emergency in banking, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application."

See the following pages of the Congressional Record, Vol. 77, Part 1, March 4, 1933, pages 76 and 79 (House Debate) and Pages 49, 50, 52, 58, 63 and 66 (Senate Debate), for Congressional comment on the emergency nature of the Act.

The act amended The Trading with the Enemy Act of October 6, 1917 by adding the following italicized portions:

"During time of war or during any other period of national emergency declared by the President, the President may *through any agency that he may designate, or otherwise,* investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise, and transactions in foreign exchange, *transfers of credit between or payments by bank-*

> *ing institutions, as defined by the President,* and export, hoarding, melting, or earmarking of gold or silver coin, of bullion or currency . . .''

In the congressional debate on the measure, one of the bill's proponents, Senator Glass, in explaining the measure said:

> ''About the really arbitrary provision of the bill is that provision which authorizes the President, under the Act of October, 1917, to embargo gold payments and to penalize the hoarding of gold and currency. I do not know who there is with wisdom enough to define hoarding * * * but there is no difficulty in the world about following gold withdrawals to their destination and penalizing those people who are so unpatriotic as to accentuate this desparate situation by undertaking to deplete the gold of the banks. The banks themselves should have done that long ago * * * Under that provision of the bill I anticipate very little difficulty in tracking the gold down and in punishing, by fine and imprisonment if necessary, people who thus hoard their gold.'' (Congressional Record, Vol. 77, Part 1, p. 58)

Throughout the debates on the bill, as recorded in the Congressional Record, it is continually referred to as, ''a bill to provide relief in the existing national emergency.''

With the passage of the act on March 9, 1933, the President now had authority delegated to him by Congress to make emergency orders respecting gold and gold bullion, the violation of which would bring criminal sanctions. On March 10, 1933, the President issued Executive Order 6073 (Codified at 31 CFR, Sec. 120.-3). This executive order authorized the Secretary of

the Treasury to permit certain banks to reopen under his regulations, but prohibited the removal from the United States, or any place subject to its jurisdiction of "any gold coin, gold bullion, or gold certificates, except in accordance with regulations prescribed by or under license issued by the Secretary of the Treasury." On April 5, 1933, the President promulgated Executive Order 6102. (Set out in *Campbell v. Chase Nat. Bank of City of New York,* 5 F. Supp. 156 at 159.) By this executive order, the hoarding of gold was prohibited and all persons were required to deliver, on or before May 1, 1933, to stated banks "all gold coin, gold bullion and gold certificates," with certain enumerated exceptions. The holders of the gold were to receive "an equivalent amount of any other form of coin or currency, coined or issued under the laws of the United States." By a further order on April 20, 1933, additional restrictions were applied, dealing principally with the export of gold under license. The Secretary of the Treasury followed these orders with a series of regulations making them effectual.

Finally, on August 28, 1933, all the previous orders pertaining to gold were merged in a comprehensive order: Executive Order 6260.

Executive Order No. 6260 issued August 28, 1933 and which superseded the order of April 5, 1933, provided as follows, so far as here now material:

> "By virtue of the authority vested in me by Section 5(b) of the act of October 6, 1917, as amended by Section 2 of the act of March 9, 1933, entitled 'An act to provide relief in the existing national emergency in banking and for other purposes,' 'I,

> Franklin D. Roosevelt, President of the United States of America, do declare that a period of national emergency exists, and by virtue of said authority and all other authority vested in me, do hereby prescribe the following provisions for the investigation and regulation of the hoarding, earmarking, and export of gold coin, gold bullion, and gold certificates by any person within the United States or any place subject to the jurisdiction thereof. * * * ' "

The order goes on to provide that within fifteen days from the date of its issuance, every person owning gold coin, gold bullion, or gold certificates shall file a return giving complete information relative thereto. It then sets out certain categories of gold coin and gold bullion for which no return need be filed. It sets up licensing requirements for the acquisition and possession of certain named categories of gold coin and gold bullion and also for the earmarking and export of gold coin and gold bullion. The order further empowers the Secretary of the Treasury to issue regulations for the purpose of carrying out the order and then reiterates the penalty provisions found in section 95(a) of Title 12. (The relevant parts of the order are set out in full in the Appendix hereto.)

All of the aforementioned executive actions taken under 12 U.S.C. 95(a) were clearly of an emergency stop-gap nature. But on January 15, 1934, President Roosevelt in his message to Congress asked that the United States be established on a new permanent monetary basis, and laid down what he considered the requirements for a permanent policy with respect to gold. He said:

> "Certain lessons seem clear. For example, the free circulation of gold coin is unnecessary, leads to hoarding, and tends to a possible weakening of national financial structure in times of emergency. The practice of transferring gold from one individual to another, as from the Government to an individual, within a nation, is not only unnecessary, but is in every way undesirable. The transfer of gold in bulk is essential only for the payment of international trade balances. Therefore, it is a prudent step to vest in the Government of a nation the title to and possession of all monetary gold within its boundaries and keep that gold in the form of bullion rather than in coin."

He then went on to say,

> "With the establishment of this *permanent* policy, placing all monetary gold in the ownership of the Government as a bullion base for its currency, the time has come for a more certain determination of the gold value of the American dollar." (Emphasis supplied.)

The legislation requested by President Roosevelt was passed on January 30, 1934, and came to be known as The Gold Reserve Act of 1934 (48 Stat. 343). The act is now codified in 31 U.S.C.A., Section 442 of which provides in substance that the Secretary of the Treasury shall by regulation issued under this section, "prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported or earmarked." Section 443 provides in substance that any gold acquired or held in violation of certain enumerated statutes or any regulations issued by the Secretary of Treasury, shall be forfeited to the Government and in addition any person failing to

comply with the enumerated statutes or any regulations thereunder shall be subject to a penalty equal to twice the value of the gold so seized or involved. (Sections 442 and 443 are set out in full in the Appendix hereto.)

Another section of The Gold Reserve Act, which should be noted, is Section 13, now codified at 12 U.S.C.A. Section 213 (Set out in full in the Appendix hereto). This section provides Congressional approval, ratification and confirmation of all actions, regulations and orders *theretofore* taken by the President or the Secretary of the Treasury.

Section 213 is strikingly similar in form and purpose to section 1 of the Act of March 9, 1933 (48 Stat. 1). That section also undertook to confirm and ratify acts of the President taken prior to the passage of the Act of March 9, 1933. The necessity for Section 1 of the Act of March 9, 1933, grew out of the fact that the President had issued certain proclamations under the old Trading with the Enemy Act prior to the passage of the Act of March 9, 1933, and there was good ground to believe that his acts were indeed unauthorized. The section however, undertook to confirm acts not only done theretofore but also acts done *after* the passage of the act. The words used were "heretofore or hereafter." Senator Reed in the Congressional debate on the Act of March 9, 1933, commented on this section,

> "If President Roosevelt should go beyond the section of The Trading with the Enemy Act, the approval we are giving him would be of no effect." (Congressional Record, Vol. 77, Part 1, p. 63.)

The situation on January 30, 1934, was similar and the purpose of Section 213 of The Gold Reserve Act

was obviously to remove any doubts as to the legality of the President's acts done between the passage of the Act of March 9, 1933 and the passage of The Gold Reserve Act of 1934. It is interesting to note, however, that in the ratification provision in the 1934 act, the word "hereafter" was eliminated and Congress merely confirmed acts done "heretofore." In referring to this section, one Congressman pointed out,

> " * * * Ratifying all these orders is an utterly useless thing to do. The last one of these orders was issued pursuant to legislation, in which we gave the President or Secretary of the Treasury wide authority in these matters.
>
> "If they exceeded their authority, full ratification at this time would not better the situation any. If they issued orders contrary to the constitution, such ratification as we might make at this time would serve no purpose." (Congressional Record, Vol. 78, Part 1, p. 1010, Remarks of Representative McGugin)

After the passage of The Gold Reserve Act of 1934, we find no further congressional action taken with respect to 12 U.S.C. 95(a) or Executive Order 6260 until 1941. In 1941, with the outbreak of World War II, Congress again hastened to grant to the President certain emergency powers. Especially pressing was the need for authority in the President to deal with the property of foreign nationals. The Trading with the Enemy Act of 1917 was once again pressed into service. This was done by Congress in the First War Powers Act of December 18, 1941. (55 Stat. 838.) Title III of this act amended the Trading with the Enemy Act by adding provisions relating to the powers of the Presi-

dent in connection with the property of foreign nationals and foreign countries. The structure and language of 12 U.S.C. 95(a), however, was retained, and the punishment provision was left unchanged from the original provision in the Trading with the Enemy Act (40 Stat. 411, Sec. 16), and which was retained in the Act of March 9, 1933. (48 Stat. 1, Sec. 2.) With the addition of the 1941 provisions relating to dealings in the property of foreign nationals and foreign countries during time of war, the statute was brought into its presently existing form as it is found in Title 12 U.S. C.A., Section 95(a).

It is interesting to note that Title IV of the First War Powers Act limited the operation of certain portions of the Act to the duration of the war plus six months, but set no time limit on the operation of Title III of the Act, which contained the Trading with the Enemy Act. The explanation given in the 1941 U.S. Code Congressional Service is as follows (p. 1032):

> "Title IV (of the First War Powers Act) provides a time limit for Titles I and II of the bill * * * . The provisions of Title III *are limited by their own terms* and thus do not require a special termination date." (Emphasis supplied.)

The First War Powers Act also contained a ratification provision similar in form to the ones noted earlier in the Gold Reserve Act and the Act of March 9, 1933. This provision was Section 302 of the Act, now codified at 50 U.S.C.A., App. Section 617. It provided congressional ratification of actions *theretofore* taken by the President or the Secretary of the Treasury under the Trading with the Enemy Act. (This section is set out in full in the Appendix hereto.)

Lest it be assumed that in enacting this ratification provision in 1941, Congress was concerned over the status of Executive Order 6260, or any such Presidential act occurring during the early days of the New Deal, we shall refer briefly to the congressional debate on Section 617, which was Section 302 of the House and Senate bills. Following is the comment of Representative Hancock (Representative Hancock was a member of the House Judiciary Committee, which reported the bill out and was explaining its provision to the House):

> "Section 302 is a very common sort of clause, a sort of saving clause, that is put into many bills of this kind. I assume that the real purpose of it is to legalize certain *seizures, contracts* and *censorships* that have already been made *in anticipation of the passage of this bill.*" (Congressional Record, Vol. 87, Part 9, p. 9862.) (Emphasis supplied.)

And the comment of Mr. Kefauver:

> " * * * It was explained to us by representatives of the Treasury that it was absolutely necessary for the present act—5(b)—to be re-enacted in order to enable the Treasury to carry out its policy of freezing certain credits and of handling certain financial interests during the war." (Congressional Record, Vol. 87, Part 9, p. 9865.)

Finally we note the highly illuminating comment of Mr. Robinson, who is also a member of the House Judiciary Committee, and who in explaining Section 617, said:

> "The bill that was brought to us was very broad indeed. It provided to make active and vitalize all acts, actions, regulations, rules, orders, and procla-

> mations that had been made theretofore, from October 6, 1917, when the Trading with the Enemy Act was first passed. Amendments were adopted by our committee; but your committee realizing that *we must protect the government for its actions during recent months when it took over this* $7,000,000,000 *of assets and property of foreign nations, made the necessary provisions in this bill.*" (Congressional Record, Vol. 87, Part 9, p. 9866.) (Emphasis supplied.)

With the enactment of the First War Powers Act, more than fifteen years ago, we reach the last congressional reference to any of the actions taken by President Roosevelt under Section 95(a). In fact, it appears clearly from a reading of the congressional discussion surrounding the First War Powers Act that Congress was not at all concerned with President Roosevelt's depression activities, but was rather concerned over the legality of certain acts involving the seizure of property belonging to foreign nationals. The 1941 Act is therefore certainly not indicative of any congressional intent to revive or keep in force any executive orders or actions promulgated under 12 U.S.C.A. 95(a) back in 1933. In any event, the National Emergency of 1941 was terminated on April 29, 1952, by Presidential Proclamation No. 2974 (17 FR 3813).

An examination of the record therefore leads to the conclusion that Congress has had nothing to say about the action of the President under Executive Order 6260 since it passed the Gold Reserve Act in January of 1934. Nor has there been any mention of Executive Order 6260 by President Roosevelt or any succeeding president in any executive order or proclamation since

January 15, 1934, the date of promulgation of Executive Order 6560, which was the last amendment of Executive Order 6260.

B. Argument

The gravamen of appellant's alleged offense is the violation of the terms of the President's Executive Order 6260. It is fundamental that the denomination and definition of what is a criminal offense and the penalty to be imposed for its commission is a function of the legislative branch of Government. In our system of Government, the President is primarily the executive branch of the Government, and under the constitutional doctrine of separation of powers, it is fundamental that the executive has no authority to declare what acts shall constitute a criminal offense, nor can the legislative delegate such authority to him. 11 Am. Jur., Constitutional Law, Section 244, p. 965. The legislature may, however, provide that a violation of an executive order shall constitute a criminal offense. *U. S. v. Grimaud,* 220 U.S. 506, 55 L.ed. 563, 41 S.Ct. 480.

And where a statute does not provide that the violation of presidential regulations shall amount to a criminal offense, the regulations themselves are ineffectual to create such an offense. There must in all cases be statutory authority for declaring that an act amounts to a crime, and in addition the penalty must be fixed by the legislature itself. *U. S. v. L. Cohen Grocery Co.,* 255 U.S. 81, 65 L.ed. 41 S.Ct. 298; *U. S. v. Grimaud, supra.*

Applying these principles, it is clear that whatever authority President Roosevelt had to create crimes relating to gold, must be found in the source of his au-

thority, 12 U.S.C.A., Sec. 95(a). His authority can certainly rise no higher than its source and must therefore be limited by the delegation of power contained in said section.

An analysis of Section 95(a) makes it clear that certain powers are delegated to the President to be used only under certain conditions. These conditions are, "during the time of war or during any other period of national emergency declared by the President." The statute goes on to provide a criminal penalty of a fine of $10,000 or a prison sentence of ten years, or both, for violation of any orders made by the President under this Statute. It is a well-settled general rule that penal statutes are subject to a strict construction.

> *U. S. v. Resnick,* 299 U.S. 207, 81 L.ed. 127, 57 S.Ct. 126;
>
> *Federal Communications Comm. v. American Broadcasting Co.,* 247 U.S. 284, 98 L.ed. 699, 74 S.Ct. 593;
>
> *U. S. v. Halseth,* 342 U.S. 277, 96 L.ed. 308, 72 S.Ct. 275.

In view of the fact that Section 95(a) is merely a repository of powers available to the President under certain stated conditions, it is essential to the validity of the exercise of those powers that these conditions obtain.

In *Panama Refining Co. v. Ryan,* 293 U.S. 388, 79 L.ed. 446, 55 S.Ct. 241, the Supreme Court in dealing with the question of delegation or legislative powers said (p. 432):

> "If the citizen is to be punished for the crime

> of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown."

And the court further went on to say that when an administrative agency is required as a condition precedent to an order, to make a finding of fact, the validity of the order must rest upon the needed finding. If it is lacking, *the order is ineffective.*

And in *Estep v. United States,* 327 U.S. 114, Justice Murphy in his concurring opinion (pages 126 and 127) said,

> "Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the administrative agency, and that it not be issued in such a way as to deprive the person of his constitutional rights."

In *Toledo, P. & W. R. R. v. Stover,* 60 F.Supp. 587 (D.C. Ill. 1945), the Court said (page 593):

> "And where an executive exercises powers which are delegated to him by an enabling act, he must exercise the power so granted in substantial conformity with the conditions and requirements declared in the act. (Citing cases)
>
> "It is upon such principles that our Government was founded. The executive department of our Government cannot exceed the powers granted to it by the constitution and Congress, and if it does exercise a power not granted to it, or attempts to exercise a power in a manner not authorized by statutory enactment, *such executive act is of no legal effect."* (Emphasis supplied)

The appellant here is not attacking the validity of Section 95(a) of Title 12 U.S.C. Nor is he attacking the validity of Executive Order 6260 when it was issued. A cursory review of the conditions outlined above eliminates any doubt as to the existence of the conditions necessary for the President to exercise powers granted him under 95(a). It is clear that a national emergency existed on August 28, 1933, it is clear that the President did declare a period of national emergency based on the financial crisis then existing. It follows therefore that Executive Order 6260 was, in 1933, a perfectly valid emergency order. But it does not follow that an emergency order which is valid during the existence of the emergency out of which it arose remains valid, *ad infinitum,* regardless of the existence or non-existence of the emergency.

Executive Order 6260 was promulgated more than 22 years ago. It cannot be disputed that the order arose out of and was designed to meet a specific existing national emergency, to-wit: the Depression. True, it was part of a program of legislation which was to result in lasting changes in the American social and legal structure but there can be no doubt that in itself, 6260 was but an emergency measure. The emergency was the monetary and banking crisis in which the United States found itself in 1933.

The appellant cites to this Court a principle of law which has never been challenged. It is, that a law depending upon the existence of an emergency or other certain state of facts to uphold it, ceases to operate if the emergency ceases or the facts change. *Chastleton Corp. v. Sinclair,* 264 U.S. 543, 44 S.Ct. 405, 68 L.ed.

841 (1924). That case involved the validity of certain administrative orders issued under a statute declaring an emergency. The Supreme Court examined the validity of the statute and speaking through Justice Holmes, said:

> " * * * And still more obviously so far as this declaration looks to the future, it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed * * *. We need not enquire how far this court might go in deciding the question for itself, on the principles explained in *Prentis v. Atlantic Coast Manufacturing Company,* 211 U.S. 210, 227. See *Gardner v. Collector,* 6 Wall. 499; *South Ottawa v. Perkins,* 94 U.S. 260; *Jones v. United States,* 137 U.S. 202; *Travis v. Yale & Towne Manufacturing Company,* 252 U.S. 60, 80. These cases show that the Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law, and if the question were only whether the statute is in force today, upon the facts that we judicially know we should be compelled to say that the law has ceased to operate."

The *Chastleton* case is still a leading case and has never been over-ruled. The principle of the *Chastleton* case has been approved in the following cases:

> *Home Bldg. and Loan Assn. v. Blaisdell,* 290 U.S. 398, at pp. 443, 447, 54 S.Ct. 231, 78 L.ed. 413;
>
> *Peck v. Fink* (C.C.A. D.C.) 2 F.(2d) 912 (certiorari denied 225 U.S. 631);

Whaley v. Norment (C.C.A. D.C.) 6 F.(2d) 716;

Dist. of Col. v. McKee (C.C.A. D.C.) 24 F.(2d) 894;

Safeway Stores v. Botti, 137 N.J.L. 437, 60 A. (2d) 318 (N.J. 1948).

In the *Botti* case, above mentioned, a city ordinance of Jersey City, New Jersey, provided that retail meat stores should remain closed on Monday, because of conditions arising out of the war emergency. The defendants were convicted and fined for violation of the ordinance and appealed. The judgment of conviction was set aside and the Court said (page 319):

> " * * * The emergency which brought the regulation into being has long since ceased to exist and the ordinance has become *functus officio.*"

The Court went on to cite the principle of the *Chastleton* case and went on to say:

> "The subsistence of the exigency upon which the continuation of the law depends is always open to judicial inquiry. The operation of the regulation itself could not validly outlast the emergency."

And, on page 320:

> "We take judicial notice of the complete cessation of the conditions which gave rise to the emergency found by the local legislative body."

Under the principle of the *Chastleton* case, the conclusion is inescapable that if the National economic emergency which empowered the President to promulgate Executive Order 6260 has passed, then his order will have lapsed with the passing of the emergency. It is elementary law that the courts will take judicial notice of general economic conditions, their rise, continuance,

progress and termination. 31 C.J.S., Evidence, Sec. 63, pp. 643-648. It is also elementary law that the courts will take judicial notice of matters which are common knowledge. 20 Am. Jur., Evidence, Sec. 18, p. 49. Is there anyone in the United States today who doubts that the Depression has ended? It is common knowledge that the Depression is over, and that the particular emergencies which it brought with it have long since passed.

This truism has many times been recognized by the courts, especially in the so-called "mortgage-moratorium" cases. The validity of state mortgage-moratorium laws was upheld as a constitutional exercise of the States' police power in *Home Building and Loan Assn. v. Blaisdell,* 290 U.S. 398, 54 S.Ct. 231, 78 L.ed. 413. The *Blaisdell* holding was based on the existence of the depression emergency. The mortgage moratorium issue arose again in many states when the legislatures attempted to continue these laws in effect several years after the depth of the depression had been reached.

Th Alabama Court in *First Natl. Bank of Birmingham v. Jaffe,* 239 Ala. 567, 196 So. 103 (Ala. 1940), held that although the mortgage moratorium legislation was valid as an emergency measure taken to meet the economic emergency of the depression, it was no longer constitutional when the economic emergency had fully passed and the Court held that the emergency had fully passed by April of 1939. In *Jefferson Standard Life Ins. Co. v. Noble,* 185 Miss. 360, 188 So. 289, the Mississippi Court held the economic depression which had created emergency conditions had passed by 1938. The Nebraska Court in *First Trust Co. of Lincoln v. Smith,*

134 Neb. 84, 277 N.W. 762, held that the economic emergency no longer existed in 1937. The South Dakota Court found the economic depression had passed by 1941, *Petition of Olesen,* 68 S.D. 435, 3 N.W.(2d) 880. The Arizona Court found that the economic emergency had passed in 1937, *Pouquette v. O'Brien,* 55 Ariz. 248, 100 P.(2d) 979. See also *Hull v. Rolfsrud,* 65 N.W. (2d) 94 (N.D. 1954), in which the Court took judicial notice of the fact that the Great Depression existed in North Dakota from 1930 to 1940.

The Iowa Court in dealing with the same question in *First Trust Joint Stock Land Bank of Chicago v. Arp,* 225 Ia. 1331, 283 N.W. 441 (Iowa 1939), rendered a particularly succinct opinion on the subject. The Court, after quoting the language of the *Chastleton* case, as used in the *Blaisdell* case, went on to say (page 443):

> "Emergency in order to justify the intervention of the reserve police power must be temporary, or it cannot be said to be an emergency. If a so-called emergency exists beyond a temporary period then it is no longer an emergency but a status. * * * The existence of an emergency is necessarily a fact question. While declaration of the executive and pronouncements of the Legislature are entitled to great weight and should be carefully considered, yet, the fact question still exists, and this can be determined by record facts, history of current events, and common knowledge and information. In other words, a court, in determining the existence of an emergency, may and should take judicial notice of conditions existing at the time the emergency or its continued existence is questioned."

The Court went on to find that although an emergency had existed in 1933, the depression conditions and the

emergency which accompanied them no longer existed in 1939 and on that basis declared the legislation unconstitutional.

From the foregoing cases, it is apparent that the courts of this country have taken judicial notice that the Depression came to an end certainly no later than 1940. These cases further support the rule that it is the duty of a court to take judicial notice of the conditions upon which legislation depends for its validity and to rule upon such validity in the light of the conditions it finds.

The life of Executive Order 6260 was limited, upon its face, to the duration of the national economic emergency of 1933. If there had been no such emergency the Executive Order would have been totally invalid in view of the President's impotency to declare acts criminal in the absence of legislative delegation of authority. The authority delegated the President by Section 95(a) is clearly limited to a period of emergency. If Executive Order 6260 would have had no validity from the very day of its promulgation, had there been no emergency to sustain it, can it be doubted that it has no validity today, when there is no emergency to sustain it? It is submitted that the proposition admits of no doubt.

The proper way to seek to continue in force a preexisting executive order, which may have lapsed because of a cessation of the emergncy upon which it is predicated, is by specific executive revival of such preexisting order. A clear example of this is Executive Order 10348, issued by President Truman on April 26, 1952, 17 F.R. No. 84, page 3769. That executive order,

while having nothing to do with the question at issue here, specifically provided that certain executive orders of April 10, 1940, and August 20, 1948, and "all delegations, designations, regulations, rulings, instructions and licenses issued under such orders are hereby continued in force according to their terms for the duration of the period of the national emergency" proclaimed in 1950. It is submitted that the proper way to breathe life into an extinct executive order is by revival under a later executive order. There has never been any executive order issued reviving or continuing in force Executive Order 6260.

It should be noted in connection with Executive Order 6260, that the order has been held to be valid and effective and still extant. We do not here concern ourselves with those early cases challenging the constitutionality of 12 U.S.C.A. 95(a) or the constitutionality of the President's action under Executive Order 6260, but we do note the case of *Ruffino v. United States,* 114 F.(2d) 696 (C.C.A. 9), decided September 11, 1940. In the *Ruffino* case the Court made the comment (page 697) with reference to Executive Order 6260:

"This order remains extant."

The Court cited as authority for the proposition the case of *Farber v. United States,* 114 F.(2d) 5 (C.C.A. 9), decided July 27, 1940. The Court there upheld the validity of Executive Order 6260 on two grounds. The first was that the enactment of the Gold Reserve Act of 1934 did not repeal Section 95(a) and Executive Order 6260. The Court ruled that there was no inherent contradiction between the Gold Reserve Act and Executive Order 6260 and that the two were consistent. The second

ground was that by the ratification provision of the Gold Reserve Act (12 U.S.C.A. Sec. 213), Congress ratified all orders issued by the President under the Act of March 9, 1933, including necessarily Executive Order 6260, and hence, said the Court, Executive Order 6260 is valid and effective.

With reference to the Court's first point, namely, that there is no contradiction between the Gold Reserve Act and Executive Order 6260, we do not concern ourselves, for we do not challenge Executive Order 6260 on that ground. With reference to the Court's second point concerning the effect of the ratification provision we direct the Court's attention to the preceding discussion of the background of this section of the Gold Reserve Act of 1934. We there pointed out that the Congressional discussion on this provision makes it clear that Congress felt that the provision would not result in enlarging the President's powers beyond the limit set out in the enabling act, 12 U.S.C. Section 95(a). It is further to be noted that the ratification provision applies only to acts *"heretofore"* done by the President. The word *"heretofore"* clearly has reference to the period prior to the enactment of this provision on January 30, 1934. The effect of the ratification provision was to establish beyond any doubt the legitimacy of Executive Order 6260 as of the date it was issued, August 28, 1933, and as of the date it was ratified, January 30, 1934. But the fact that Executive Order 6260 had congressional ratification as of January 30, 1934, could not operate to transform the order from an executive act performed under specific legislative authority to a permanent piece of legislation in itself.

That Congress had no intention of effecting such a result is clearly indicated by the fact that the ratification provision contained in Section 1 of the Act of March 9, 1933 (48 Stat. 1) undertook to ratify all presidential acts theretofore *and thereafter* done. In the ratification provision contained in Section 13 of the Gold Reserve Act of 1934 (48 Stat. 343, 12 U.S.C.A. Section 213), the ratification applied only to acts *theretofore* done.

That Executive Order 6260 was valid when promulgated, we do not deny. That it was valid after January 30, 1934, throughout the existence of the depression era, we also do not deny. And inasmuch as the *Ruffino* case was decided in 1940, we concede the possibility that the order could have been upheld even then on the grounds that (a) either the depression was not yet over or (b) that it was over so recently that it was only proper to sustain the executive order in order to deal with the emergency conditions which had not been entirely abated. But to contend that an order which depends for its validity upon the existence of an emergency remains valid some 23 years after its issuance is to deny the very meaning of the word, "emergency." To sustain such a position would mean serious consequences and far-reaching effects on the doctrines of "emergency legislation" and "emergency powers." To say that the nation's gold policy has continued down to the present day and that the provisions of the executive order are still needed is no answer. It is submitted that the Gold Reserve Act of 1934, a permanent piece of legislation, adequately covers the field. The only thing that Section 95(a) of Title 12 provides, which is not found

in the Gold Reserve Act, or the regulations of the Secretary of the Treasury thereunder, are criminal penalties. Should it be said that these criminal penalties are still desirable, the answer must be let Congress enact such penalties into permanent legislation. It is certainly no argument to say that a law is valid because it is needed. It is submitted, therefore, that Executive Order 6260 was not in force on Feb. 12, 1954, and it was therefore error to deny appellant's challenges to the indictment.

II

It Was Not a Criminal Offense Against the United States to Possess Gold Bullion on February 12, 1954, the Date of the Alleged Offense.

Even if Executive Order 6260 was in effect on February 12, 1954, it did not operate to make the acquisition or possession of gold bullion a criminal offense. It will be recalled that 12 U.S.C.A. Section 95(a) granted to the President the power, under certain prescribed circumstances, to "*investigate, regulate* or *prohibit* * * * the importing, exporting, hoarding, melting, or earmarking of gold * * * coin or bullion * * *." The President was thus given three separate and distinct powers by the act; (1) investigation, (2) regulation, and (3) prohibition.

On April 5, 1933, the President issued his first executive order under the act of March 9, 1933, and in such executive order he expressly invoked his power *to prohibit* the hoarding of gold bullion but he did not in such order invoke his power to investigate or regulate such. This first executive order does not appear in the Federal Register because such was not then in existence. It

is found, however, and quoted verbatim in *Campbell v. Chase National Bank,* 5 F.Supp. 156 at p. 160.

In Executive Order 6260, however, the President merely said,

> " * * * I * * * do hereby prescribe the following provisions for *the investigation and regulation* of the hoarding, earmarking, and export of gold coin, gold bullion, and gold certificates * * *." (Emphasis supplied)

It is apparent that in Executive Order 6260, as promulgated and as it still exists, the President *never invoked the power to prohibit the hoarding, etc., of gold bullion.* He deliberately chose to abandon the invocation of prohibiting such, which he expressly invoked in his first executive order of April 5, 1933, and chose the more limited powers of investigation and regulation. This has never been changed.

That this was no oversight is apparent both by the earlier order and by Executive Order No. 6560, also promulgated under the authority granted the President by 12 U.S.C.A. 95(a) wherein the President declared "I, * * * do hereby prescribe the following regulations for *the investigation, regulation, and prohibition* of transactions in foreign exchange, * * *." This later executive order No. 6560 is cited only for comparative purposes to demonstrate conclusively that the President did not choose to invoke his power to prohibit the acquisition of gold bullion. Having acted only under the authority to investigate and regulate the hoarding of gold coin, and gold bullion, it follows that the President in Executive Order 6260 could not and did not act to prohibit the hoarding of gold coin and gold bullion.

That Executive Order 6260 did not operate to prohibit the hoarding or holding in possession of gold bullion is made clear by reference to Section 442 and 443 of the Gold Reserve Act. Section 442 provides that the Secretary of the Treasury shall prescribe the conditions under which gold may be acquired and held. It then goes on to provide that "gold in *any form* may be acquired * * * or held in custody only to the extent permitted by * * * such regulations."

It is clear that this section of the Gold Reserve Act does not regulate, nor investigate, but it *prohibits* the acquiring or holding or gold bullion contrary to the regulations of the Secretary of the Treasury. It is clear that if Executive Order 6260 prohibited the possession of gold bullion, then such act would constitute a violation of both Executive Order 6260 and the Gold Reserve Act. But when we look at Section 443 of the Gold Reserve Act, we find that such is not the case. Section 443 provides a civil penalty for the holding and acquisition of gold and specifically enumerates those statutes which such holding or acquisition would violate. Title 12 U.S.C.A. Section 95(a) is not among these enumerated statutes, nor is Executive Order 6260. It follows then that a violation of the Gold Reserve Act is not a violation of Executive Order 6260 so far as acquiring or holding gold bullion is concerned. This is because the executive order merely *regulates* and *investigates* the hoarding of gold bullion. Sections 442 and 443 of the Gold Reserve Act are designed to, and do, *prohibit* the acquisition and holding of gold, unless permitted by the act and the regulations of the Secretary of the Treasury thereunder.

Should it be asserted, however, that Executive Order 6260 does, by its terms, in spite of what has been said above, seek to prohibit acquisition of gold bullion by any person, then it is clear that such would be an invalid attempt to execute his uninvoked power to prohibit and be beyond the only presidential powers invoked, *i.e.,* investigation and regulation. See *Campbell v. Chase National Bank of City of New York,* 5 F.Supp. 156 and particularly pages 174, 175, 176 and 177 thereof, such being headnotes 21 and 22 of the case. See also *United States v. Driscoll,* 9 F.Supp. 454. We believe these cases are exactly parallel in reasoning to the point just made.

Several other striking features of the Gold Reserve Act should be noted.

1. The Gold Reserve Act was *not* emergency legislation and not predicated upon that feature nor is it predicated upon the country being at war;

2. The Gold Reserve Act prohibits the acquisition and holding of gold which may be in violation of the regulations which were approved by the President;

3. Their force and effect does not depend upon any executive order;

4. They do not impose any criminal penalty, merely a forfeiture plus a civil penalty of twice the value thereof; no fine or imprisonment penalties are imposed anywhere in the Gold Reserve Act;

5. The Act was passed January 30, 1934, which was subsequent to the Trading with the Enemy amendments above mentioned.

A careful reading of the Gold Reserve Act in com-

parison with 95(a) and Executive Order 6260 must lead to the conclusion that it was Congress' intent that the Gold Reserve Act pre-empt the field of permanent legislation prohibiting the holding or acquisition of gold by private individuals. And in view of the fact that the President in Executive Order 6260 did not invoke his powers to prohibit, and in view of the further fact that the Gold Reserve Act makes no mention of 95(a) or Executive Order 6260 in enumerating the statutes which are violated by possession or acquisition of gold, it is clear that Executive Order 6260 did *not* operate to prohibit the possession of gold bullion. Since Executive Order 6260 did not prohibit the possession of gold bullion, it was not, therefore, a criminal offense against the United States to possess gold bullion on February 12, 1954, the date of the alleged offense.

III

The Indictment Does Not State Facts Sufficient to Constitute an Offense Against the United States.

The indictment here charges the appellant with having held in his possession gold bullion, *"then and there not being a person permitted to hold* in his possession or retain a legal and equitable interest in gold bullion by any regulation issued by the Secretary of the Treasury and approved by the President of the United States" (R. 3).

One can search the statutes, the executive order and the regulations of the Secretary of the Treasury in vain to discover who is a person permitted to hold gold bullion by the Treasury regulations. The reason is that the Treasury regulations have nothing to say about *per-*

sons who may hold or possess gold. They concern themselves with the *conditions* under which gold may be acquired and held. Section 54.12 of the regulations of the Secretary of the Treasury contained in 31 C.F.R. 1955 Supp. reads as follows:

> "*Conditions under which gold may be acquired, held, melted, etc.* Gold in any form may be acquired, held, transported, melted or treated, imported, exported, or earmarked only to the extent permitted by and subject to the *conditions* prescribed in the regulations in this part, or licenses issued thereunder." (Emphasis supplied)

These regulations then go on to specify the conditions under which gold may be held without a license and the conditions under which a license is required. The indictment thus charges the appellant with the nonexistent offense of holding gold while not being a *person* permitted to hold by Treasury regulation. It therefore does not charge an offense against the United States.

The indictment further charges that the appellant held in his possession gold bullion, "in excess of Thirty-five (35) Fine Troy Ounces, to-wit, approximately Fifteen (15) crucible-shaped gold ingots of a total gross weight of approximately Three Hundred Thirty-Eight and 90/100 (338.90) ounces" (R. 3). This section of the indictment is based on Sections 54.18 and 54.21 of the Treasury Gold Regulations which provide that a license shall be required to possess gold in quantities greater than a stated amount. Prior to 1954 the Treasury regulations set the limit at 35 fine troy ounces. In 1954, however, the Secretary of the Treasury amended

the regulations to raise the limit to *50 fine troy ounces.* Such amendment is contained in the 1954 pocket supplement to Vol. 31 C.F.R. Since the indictment merely charges the appellant with holding more than 35 fine troy ounces, it is submitted that it fails to charge an offense.

The indictment is further fatally defective in that although it charges the appellant with holding more than 35 *fine* troy ounces, it merely specifies 15 gold ingots weighing 338.90 ounces. It is submitted that it is no violation of Treasury regulations or any statute or executive order to possess ingots of metal with an undetermined or undefined gold content. It is the gold *content* that brings the metal within the Treasury regulations. Section 54.17 of the Treasury gold regulations makes this clear. It provides that no license shall be required for metals containing less than 5 troy ounces of *fine gold* per short ton. The regulations do not, however, contain any definition of the term, "fine gold." Reference to outside sources, however, reveals that the term "fine gold" is a term of art. The term "fineness" in this context is defined as the number of parts of gold in one thousand parts of alloy. See Vol. 2, Encl. Britannica, 1943 Ed. Article, "Assaying," page 555. In the field of assaying the term "fine gold bullion" is defined as bullion containing more than 99% gold and practically no silver. See "Fire Assaying" by O. C. Shepard and W. F. Dietrich, First Ed., N.Y. 1940, page 172.

Furthermore this indictment charges the appellant specifically with possession of "gold bullion," not merely "gold." The Treasury regulations, Section 54.4 (8) defines the term "gold bullion" as follows:

> " 'Gold bullion' means any gold which has been put through a process of melting or refining, and which is in such state or condition that its value depends primarily upon the gold content and not upon its form; the term 'gold bullion' includes, but not by way of limitation, semi-processed gold and scrap gold, but it does not include fabricated gold as defined in this section, metals containing less than five troy ounces of fine gold per short ton, or unmelted gold coin."

It follows then that an indictment for illegal possession of gold bullion omits an essential element of the offense if it fails to state the gold content of the metal held in terms of fineness. This is illustrated by the indictment which this court upheld in the case of *Ruffino v. United States,* 114 F.(2d) 696 (C.C.A. 9 1940). The indictment there charged the acquisition of gold bullion, "in quantity particularly described as approximately 78.50 ounces of gold bullion estimated .840 fine."

It is elementary law that an indictment must state every essential fact constituting the offense charged. The appellee will argue that the Government is not required to negative exceptions and that such exceptions are defensive matter. It is submitted by the appellant that a reading of Section 95(a), and the provisions of Executive Order 6260 and the regulation of the Secretary of the Treasury thereunder will make it abundantly clear that this is not merely a question of negativing a simple exception to a general prohibition. Rather, here we are dealing with a complex body of statutory and regulatory provisions. And, as recognized in *Fuller v. U. S.,* 114 F.(2d) 698 (C.C.A. 9th, 1940), which also dealt with the Gold Regulations, where exceptions and

provisos are incorporated with the language defining the offense, as they are here, it is impossible to accurately and clearly describe the ingredients of the offense here sought to be charged if the defendant is not alleged to be outside the various exceptions and provisos of the executive order and the regulations thereunder. The applicable rule is well stated in Section 42.59, Cyclopedia of Federal Procedure, Indictments and Informations, Vol. II, 3rd edition, which reads as follows so far as here material:

> "But the provisos or exceptions must always be negatived where it is a part of the description of the offense; and consequently, in doubtful cases it is better practice to negative the proviso or exception. *Where a statute makes certain acts unlawful if done without a license and excepts certain other acts from the license requirement, an indictment or information must specify the acts with sufficient precision to indicate that they come within the prohibitions rather than the exceptions of the statute.*" (Emphasis supplied)

Many Supreme Court cases are cited in support of the foregoing rules. With respect to the last sentence above quoted, the author cites in support thereof *Fuller v. United States, supra.* See also 42 C.J.S., Indictments and Informations, Sec. 140, p. 1043, and 27 Am. Jur., Indictments and Informations, Sec. 106, p. 666.

It is therefore submitted that this indictment on each of the many grounds above stated is fatally defective and does not state facts sufficient to constitute an offense against the United States.

CONCLUSION

It is respectfully submitted that the appellant did not violate Executive Order 6260, as amended, and has committed no criminal offense because Executive Order 6260 was not in force on February 12, 1954, since it had ceased to be operative with the passing of the depression emergency.

It is further respectfully submitted that even if Executive Order 6260 was in force on the date of the alleged offense, nevertheless it did not operate to make the appellant's acts a crime for the reason that it did not prohibit such acts, since the President in the executive order did not invoke his power of prohibition. Therefore, it was not a criminal offense against the United States to possess gold bullion on February 12, 1954, the date of the alleged offense.

Finally, it is respectfully submitted that the indictment does not state facts sufficient to constitute an offense against the United States for the following reasons:

1. It charges the appellant with being a person not permitted to hold gold bullion—a non-existent offense or element of an offense.

2. It fails to allege the degree of fineness of the gold which the appellant is charged with possessing.

3. It charges the appellant with holding gold in a quantity which is *not* in excess of the quantity prohibited by regulation to be held without a license.

Therefore, it is respectfully submitted that the District Court erred in denying appellant's motion to dis-

miss the indictment and his motion in arrest of judgment.

Respectfully submitted,

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APPENDIX

Statutory material set forth herein includes those portions which are relevant to the matters discussed in appellant's brief.

U.S.C.A. Title 12

Sec. 95a. Embargo on bullion or coin; hoarding; requirement of disclosure; penalties.

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

> (A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.

by any person, or with respect to any property, subject to the jurisdiction of the United States; * * *

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof, including the Philippine Islands, and the several courts of first instance of the

Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this subdivision in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

EXECUTIVE ORDER No. 6260

Aug. 28, 1933, as amended by Ex. Ord. No. 6556, Jan. 12, 1934; Ex. Ord. No. 6560, Jan. 15, 1934

HOARDING, EXPORT, AND EARMARKING OF GOLD COIN, BULLION, OR CURRENCY; TRANSACTIONS IN FOREIGN EXCHANGE

By virtue of the authority vested in me by section 5(b) of the act of October 6, 1917 (section 95a of this title), as amended by section 2 of the act of March 9, 1933, entitled "An act to provide relief in the existing national emergency in banking and for other purposes," I, Franklin D. Roosevelt, President of the United States of America, do declare that a period of national emergency exists, and by virtue of said au-

thority and of all other authority vested in me, do hereby prescribe the following provisions for the investigation and regulation of the hoarding, earmarking, and export of gold coin, gold bullion, and gold certificates by any person within the United States or any place subject to the jurisdiction thereof; and for the investigation and regulation of transactions in foreign exchange and transfers of credit and the export or withdrawal of currency from the United States or any place subject to the jurisdiction thereof by any person within the United States or any place subject to the jurisdiction thereof.

Sec. 3. Returns—Within 15 days from the date of this order every person in possession of and every person owning gold coin, gold bullion, or gold certificates shall make under oath and file as hereinafter provided a return to the Secretary of the Treasury containing true and complete information relative thereto, including the name and address of the person making the return; the kind and amount of such coin, bullion, or certificates held and the location thereof; if held for another, the capacity in which held and the person for whom held, together with the post-office address of such person; and the nature of the transaction requiring the holding of such coin, bullion, or certificates and a statement explaining why such transaction cannot be carried out by the use of currency other than gold certificates; provided that no returns are required to be filed with respect to:

(a) Gold coin, gold bullion, and gold certificates in an amount not exceeding in the aggregate $100 belonging to any one person;

(b) Gold coin having a recognized special value to collectors of rare and unusual coin;

(c) Gold coin, gold bullion, and gold certificates

acquired or held under a license heretofore granted by or under authority of the Secretary of the Treasury; and

(d) Gold coin, gold bullion, and gold certificates owned by Federal Reserve banks. * * *

Sec. 4. Acquisition of Gold Coin and Gold Bullion—No person other than a Federal Reserve bank shall after the date of this order acquire in the United States any gold coin, gold bullion, or gold certificates except under license therefor issued pursuant to this Executive order, provided that member banks of the Federal Reserve System may accept delivery of such coin, bullion, and certificates for surrender promptly to a Federal Reserve bank, and provided further that persons requiring gold for use in the industry, profession, or art in which they are regularly engaged may replenish their stocks of gold up to an aggregate amount of $100, by acquisitions of gold bullion held under licenses issued under section 5(b), without necessity of obtaining a license for such acquisitions, and provided further that collectors of rare and unusual coin may acquire from one another and hold without necessity of obtaining a license therefor gold coin having a recognized special value to collectors of rare and unusual coin (but not including quarter eagles, otherwise known as $2.50 pieces, unless held, together with rare and unusual coin, as part of a collection for historical, scientific, or numismatic purposes, containing not more than four quarter eagles of the same date and design and struck by the same mint).

The Secretary of the Treasury, subject to such further regulations as he may prescribe, shall issue licenses authorizing the acquisition of—

(a) Gold coin or gold bullion which the Secretary is satisfied is required for a necessary and lawful transaction for which currency other than gold

certificates cannot be used, by an applicant who establishes that since March 9, 1933, he has surrendered an equal amount of gold coin, gold bullion, or gold certificates to a banking institution in the continental United States or to the Treasurer of the United States;

(b) Gold coin or gold bullion which the Secretary is satisfied is required by an applicant who holds a license to export such an amount of gold coin or gold bullion issued under subdivisions (c) or (d) of section 6 hereof, and

(c) Gold bullion which the Secretary, or such agency as he may designate, is satisfied is required for legitimate and customary use in industry, profession, or art by an applicant regularly engaged in such industry, profession, or art, or in the business of furnishing gold therefor.

Licenses issued pursuant to this section shall authorize the holder to acquire gold coin and gold bullion only from the sources specified by the Secretary of the Treasury in regulations issued hereunder (As amended by Ex. Ord. No. 6556, promulgated January 12, 1934).

Sec. 5. Holding of gold coin, gold bullion, and gold certificates—After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order; provided, however, that licenses shall not be required in order to hold in possession or retain an interest in gold coin, gold bullion, or gold certificates with respect to which a return need not be filed under section 3 hereof.

The Secretary of the Treasury, subject to such fur-

ther regulations as he may prescribe, shall issue licenses authorizing the holding of—

(a) Gold coin, gold bullion, and gold certificates, which the Secretary is satisfied are required by the person owning the same for necessary and lawful transactions for which currency, other than gold certificates, cannot be used;

(b) Gold bullion which the Secretary, or such agency as he may designate, is satisfied is required for legitimate and customary use in industry, profession, or art by a person regularly engaged in such industry, profession, or art or in the business of furnishing gold therefor;

(c) Gold coin and gold bullion earmarked or held in trust since before April 20, 1933, for a recognized foreign government or foreign central bank or the Bank for International Settlements; and

(d) Gold coin and gold bullion imported for reexport or held pending action upon application for export licenses.

Sec. 9. The Secretary of the Treasury is hereby authorized and empowered to issue such regulations as he may deem necessary to carry out the purposes of this order. Such regulations may provide for the detention in the United States of any gold coin, gold bullion, or gold certificates sought to be transported beyond the limits of the continental United States, pending an investigation to determine if such coin, bullion, or certificates are held or are to be acquired in violation of the provisions of this Executive Order. Licenses and permits granted in accordance with the provisions of this order and the regulations prescribed hereunder, may be issued through such officers or agencies as the Secretary may designate.

Sec. 10. Whoever willfully violates any provision of this Executive order or of any license, order, rule, or regulation issued or prescribed hereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

U.S.C.A. Title 12

Sec. 213. Ratification of acts of President and Secretary of Treasury—All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury, under sections 51a-51d, 95, 95a, 95b, 201-211, 212, 248, 347b-347d, and 445 of this title, or under sections 821 or 823 of Title 31, or under section 5, Appendix of Title 50, are hereby approved, ratified, and confirmed. Jan. 31, 1934, c. 6, Sec. 13, 48 Stat. 343.

U.S.C.A. Title 31

Sec. 442. Regulations for the acquisition and use of gold; exemption of gold held beyond continental United States—The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and (c) for such other purposes as in his judgment are not inconsistent with the purposes of sections 315b, 405b, 408a, 408b, 440-446, 752, 754a, 754b, 767, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12. Gold in any form

may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in places beyond the limits of the continental United States.

Section 443. Acquisition and use of gold in violation of law; penalties—Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of sections 315b, 405b, 408a, 408b, 440-446, 752, 754a, 754b, 767, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12 or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of said sections or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred.

50 U.S.C. App.

Section 617. All acts, actions, regulations, rules, orders and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of the President or the Secretary of the Treasury under the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411) as amended which would have been authorized if the provisions of this act and the amendments made by it had been in effect, are hereby approved, ratified and confirmed.